

APR 7 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

May Term, 1976

No. **75-1416**

J. MILTON PEVAR, a minor by and through his
father and natural guardian, MATTHEW PEVAR,
and MATTHEW PEVAR in his own right,
Petitioners

v.

DONALD A. ROBERTS and KATHRYN T. ROBERTS,
now known as KATHRYN T. BRENGLE

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF DELAWARE

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March, 1976

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J. MILTON PEVAR, a minor
by and through his father and
natural guardian, MATTHEW PEVAR,
and MATTHEW PEVAR in his own
right,

Petitioners

vs.

DONALD A. ROBERTS and KATHRYN
T. ROBERTS, now known as
KATHRYN T. BRENGLE

**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF DELAWARE**

Petitioners, J. Milton Pevar and Matthew Pevar, pray for a Writ of
Certiorari to review the opinion and judgment of the Supreme Court of
the State of Delaware in this case.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware (appendix A p. 1A) is reported at 349 A.2d 866 (Del. Super. 1975). The opinion of the Superior Court of the State of Delaware (appendix B page) is not reported.

JURISDICTION

The Supreme Court of the State of Delaware entered judgment on
December 18, 1975.

A timely petition for rehearing was denied on January 9, 1976.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257
(3).

QUESTION PRESENTED

1. Whether it was a denial of full faith and credit to a valid judgment where the Supreme Court of Delaware refused to enforce a default judgment entered against the respondents by the United States District Court for the Eastern District of Pennsylvania after the respondents had been personally served with process in Delaware pursuant to a Pennsylvania Rule of Court and in substantial compliance with the Pennsylvania Non-Resident Motorist Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Article IV, §1, in pertinent part:

"Full Faith and Credit shall be given in each State to the . . . Judicial Proceedings of every other State."

Title 28 U.S.C. §1738, in pertinent part:

"The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Federal Rules of Civil Procedure for the United States District Courts, Rule 4, in pertinent part:

"(d) Summons: Personal Service. . . . Service shall be made as follows:

(1) upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . .

(7) upon a defendant of any class referred to in Paragraph (1) . . . of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in a manner prescribed by the law of the state in which the District Court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

"(e) Same: Service upon Party not inhabitant of or found within state. . . Whenever a statute or rule of Court of the state in which the court is held provides (1) for service of the summons or of a notice or an Order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may in either case be made under the circumstances and in a manner prescribed in the statute or rule.

"(f) Territorial Limits of effective service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state."

Pennsylvania Non-Resident Motorist Act, 75 P.S. §2001-2006, in pertinent parts:

"§2001. Service: Secretary of Commonwealth as agent.

(a) . . . any non-resident of this Commonwealth, being the operator or owner of any motor vehicle . . . , who shall accept the privilege extended by the laws of this Commonwealth to non-resident operators and owners of operating a motor vehicle . . . within . . . the Commonwealth of Pennsylvania, shall, by such acceptance . . . and by operation of such motor vehicle . . . within the Commonwealth of Pennsylvania, make and constitute the Secretary of the Commonwealth of the Commonwealth of Pennsylvania his . . . agent for the service of process in any civil suit or proceeding instituted in the Courts of the Commonwealth of Pennsylvania or the United States District Courts of Pennsylvania against such operator or owner of such vehicle. . . , arising out of, or by reason of, any accident or collision occurring within . . . the Commonwealth in which such vehicle is involved.

"§2002. Manner of Service of Process in action against non-resident or absent owner or operator of motor vehicle.

Such process shall be served. . . upon the Secretary of the Commonwealth of the Commonwealth of Pennsylvania, by sending by registered mail. . . a true and attested copy thereof, and by sending to the defendant, by registered mail, postage prepaid, a like, true and attested copy, with an

endorsement thereon of the service upon said Secretary of the Commonwealth, addressed to such defendant at his last known address."

Pennsylvania Rules of Civil Procedure, Rule 1009, in pertinent part:

"Service. . . (c) Service upon the following individual defendants may also be made as provided by the following rules: . . . a non-resident. . . , Rule 2079; . . ."

Pennsylvania Rules of Civil Procedure, Rule 2077, in pertinent part:

"Application of Rules.

(a) The rules of this chapter apply to (1) actions as to which the laws of this Commonwealth authorize service of process upon a non-resident, . . . "

Pennsylvania Rules of Civil Procedure, Rule 2079, in pertinent part:

"Service of Process. (a) If an action of the class specified in Rule 2077 (a)(1) is commenced in the county in which the cause of action arose, process may be served upon the defendant personally or by having the sheriff in said county send by registered mail, return receipt requested, a true and attested copy of the process: (1) to the Secretary of the Commonwealth, . . . and (2) to the defendant at his last known address with an endorsement thereon showing that service was made upon the Secretary of the Commonwealth."

STATEMENT OF THE CASE

On or about April 4, 1967, petitioners J. Milton Pevar and Matthew Pevar (his father) were involved in an automobile accident with respondents Donald A. Roberts and Kathryn T. Roberts (mother of Donald A. Roberts, now known as Kathryn T. Brengle). Petitioners were residents of Pennsylvania and respondents were residents of Delaware.

On April 17, 1967, petitioners filed a suit in tort against the respondents in the United States District Court for the Eastern District of Pennsylvania based on diversity of citizenship. Certified copies of the original summons and complaint in the U.S. District Court for the Eastern District of Pennsylvania show that personal service was made on both respondents on April 28, 1967, by the U.S. Marshall for the District of Delaware. Respondent Kathryn Roberts was personally served and respondent Donald Roberts was served by leaving his copy

with "Kathryn T. Roberts, his mother, a person of suitable age and discretion residing therein." The notation on the return (as reflected by the certified copy of the proceedings in the U.S. District Court) reads: "On 4/28/67 served."

The respondents never made an appearance in the action. On July 27, 1967, default judgment was entered against them by Federal District Judge E. Mac Troutman, pursuant to Rule 55(b)(2) of the Federal Rules of Civil Procedure.

On February 13, 1970, Judge Troutman sent a registered letter to the respondents informing them that a jury trial for damages would take place at 2:00 p.m. on February 16, 1970. The respondents made no appearance at the trial. The jury rendered verdicts in favor of petitioner, J. Milton Pevar for \$3,500.00 and in favor of Matthew Pevar for \$1,502.32. On October 13, 1970, petitioners motioned for judgment on the verdict in the aforesaid amounts. It was granted by Judge Troutman.

On August 6, 1971, petitioners filed an action on the aforesaid judgment in the Superior Court of the State of Delaware in and for New Castle County. Respondents appeared in this action and were represented by counsel. Respondents defended the action on the grounds that the judgment entered by the U.S. District Court for the Eastern District of Pennsylvania was not entitled to full faith and credit because that court had never obtained personal jurisdiction over the respondents. The issue of the sufficiency of service of process in the District Court action was briefed by both parties and argued before the Superior Court of Delaware on October 8th, 1974. By opinion letter, dated October 7, 1974, Judge Bernard Balick granted petitioners' motion for Summary Judgment. Judge Balick found that the Federal Court had obtained jurisdiction over the respondents because service was accomplished in accordance with Pennsylvania Rule of Civil Procedure 2079, and because there had been personal service even though substitute service was authorized by the Pennsylvania Non-Resident Motorist Act, and because a reasonable method of notification was employed and a reasonable opportunity to be heard was afforded. Judge Balick further found that the Federal Court judgement was therefore valid and was entitled to full faith and credit. On December 17, 1974, judgment was entered against the respondents by the Superior Court of Delaware.

Respondents then appealed to the Supreme Court of Delaware, again arguing that the Federal District Court in Pennsylvania had never obtained personal jurisdiction over them and that therefore that Court's judgment was void. The issue of the sufficiency of service of process was again briefed by the parties and was argued before the Supreme Court of Delaware on October 20, 1975. On December 18, 1975, that Court decided that the service of the original complaint and summons upon the respondents by the United States Marshall for the District of Delaware was unauthorized by any state or federal statute or rule. The Court therefore held that the federal court's judgment was not entitled to full faith and credit.

It should be noted that at no stage of the proceedings had the respondents denied receiving personal service of the original complaint and summons on April 28, 1967. On the contrary, in their answers to Petitioners' Requests for Admissions filed with the Superior Court of the State of Delaware, respondents specifically admit that in the month of April, 1967, they received copies of Petitioners' complaint in the United States District Court, which copies had been hand delivered to them "by the United States Marshall at Philadelphia".

The Pevars now petition for certiorari.

REASONS TO GRANT CERTIORARI

SUMMARY

1. The Supreme Court of Delaware denied full faith and credit to a valid judgment entered by the United States District Court for the Eastern District of Pennsylvania. The Delaware Court's decision is not in accord with applicable decisions of this Court.

ARGUMENT

I.

A valid judgment of one state is entitled to full faith and credit in all other states. *U.S. Const.* Art. IV, § 1; Restatement, *Conflict of Laws* 2d § 93. Once judgment has been rendered by a Court which has the requisite jurisdiction over the subject matter and the parties, it is not subject to attack. *Milliken v. Meyer*, 311 U.S. 457 (1941). This constitutional principle is binding on the states whether the original judgment is entered by a state court or by a Federal court. *Bigelow v. Old Dominion Copper Mining and Smelting Co.*, 225 U.S. 111 (1916).

The certified court records of the United States District Court for the Eastern District of Pennsylvania show that petitioners' original complaint in that Court alleged diversity of citizenship and the jurisdictional amount. The validity of that court's judgment therefore depends entirely on the sufficiency of service of process upon the respondents. The return of the Deputy United States Marshall, District of Delaware, shows that the summons and complaint were personally served on respondents. The decision of this Court as to the sufficiency of this service is necessary to prevent the denial of full faith and credit to the valid judgment entered by the United States District Court.

A. Service of Process upon the respondents was in accordance with Pennsylvania Statute and Rule of Court.

Federal Rule of Civil Procedure 4 provides that a Federal District Court may make valid extraterritorial service when it is made under the circumstances and in the manner prescribed in a statute or rule of Court of the state in which the District Court is held. The Pennsylvania Non-Resident Motorist statute, 75 Purdon's Pa. Stat. Ann. § 2001-2006 authorizes substituted service upon the Secretary of the Commonwealth combined with extraterritorial service upon the non-resident by means of registered mail. If the procedure set out in 75 P.S. § 2002 is strictly complied with, then the Pennsylvania court or the Federal District court sitting in Pennsylvania obtains full personal jurisdiction over the non-resident defendant, *even if* that non-resident never receives the mailed copy of the summons and complaint. 75 P.S. § 2002; *Sipe v. Moyers*, 353 Pa. 75 (1945). Here, however, there is no dispute that the non-resident respondents received personal notice of petitioners' law suit only eleven days after the filing of the complaint, when they were personally served by the U.S. Marshall.

The legislative purpose behind the Pennsylvania Non-Resident Motorist Act is expressed in the act itself: "This act shall be construed to extend the right of service of process upon non-residents . . . , and shall not be construed as limiting any provisions for the service of process now or hereafter existing." 75 P.S. § 2005. In order to accomplish this purpose, the legislature adopted the fiction that the non-resident driver appoints the Secretary of the Commonwealth as his agent to receive service of process. Because the "agent" can be personally served without difficulty, constitutional due process requires nothing more than that

the defendant himself be served by registered mail at his last known address. *Hess v. Pawloski*, 274 U.S. 352. After receiving that minimum notice, the non-resident is then in the position to obtain full details from the Secretary as his "agent".

In this case, however, the respondents received far more than the minimum notice required by due process. Since they were personally served, they were already informed of the full details of the law suit, and the absence of any service upon the Secretary in no way impinged upon their due process rights. Thus, the respondents received the best service and notice possible — personal service. From the time of their receipt of that notice, they were fully informed of the full details of the law suit. The primary object of the extraterritorial service provisions of the Pennsylvania Non-Resident Motorist Act — notice to the defendant of the proceedings against him — was fully and adequately accomplished by the personal service in this case.

The service upon the respondents was also fully in accordance with a Pennsylvania Rule of Court, Pennsylvania Rule of Civil Procedure 2079 (a), which provides that where the laws of Pennsylvania authorize service of process upon a non-resident, process may be served upon the defendant personally.

The Supreme Court of Delaware pointed out in its opinion that Pa. R.C.P. 2079 is by its terms applicable only when an action is commenced in the county in which the cause of action arose. On the basis of this wording, the court held that the personal service authorized by Rule 2079 can be utilized only when the action is filed in the "cause of action" county. This position is incorrect in light of the Federal authorities which have considered this question. Federal Rule of Civil Procedure 4(e) specifically provides: "Whenever a statute or *rule of court* of the state in which the district is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state, . . . service may in either case be made under the circumstances and in the manner prescribed in the statute or *rule*." (Emphasis added). Furthermore, the case of *Burbank v. Grant*, 56 F.R.D. 484 (E.D.Pa. 1972) held that Pa. R.C.P. 2079 is not a venue restriction on the federal court, and that, despite numerous Pennsylvania state court decisions holding that service upon a non-resident pursuant to Rule 2079(a) is valid only if the action is commenced in the county where the cause of action arose, Pa. R.C.P. 2079(a) does *not* limit a federal court's jurisdiction over a defendant or its

venue even if the action is brought in a federal judicial district other than the federal judicial district in which the cause of action arose. *Burbank v. Grant*, *supra*. at 487.

Petitioners, of course, filed this action in the same federal judicial district in which the cause of action arose. Therefore, methods of service as authorized by Pa. R.C.P. 2079(a) were clearly available to the petitioners in this action.

This conclusion is further supported by a noted commentator:

"Frequently the state law conditions use of a particular means of service, as under the Non-Resident Motorist Statutes, on the action being brought in the county in which the transaction occurred. Such restrictions on venue are not binding in Federal Court; instead it is enough that suit is brought in the Federal district which includes the county in question." Wright, *Law of Federal Courts*, 2d Ed., §65 (1970).

Thus, if service of process is made in accordance with Pa. R.C.P. 2079(a) and complies with the Federal Venue Statute, 28 U.S.C. §1391(a), service is lawful and valid. *Giffin v. Ensign*, 234 F. 2d 307 (C.A.3, 1956). In the present diversity action, suit was brought in the Federal judicial district where all the plaintiffs resided and in which the claim arose. Furthermore, the personal service upon the respondents was in accordance with Pa. R.C.P. 2079(a). This Court should therefore reverse the decision of the Supreme Court of Delaware and hold that the judgment entered by the U.S. District Court for the Eastern District of Pennsylvania is valid and entitled to full faith and credit.

B. Respondents have at all times freely admitted that they received personal service and full notice; they should therefore not be heard to dispute the validity of the District Court's judgment.

There can be no question that the respondents were at all times fully informed of the proceedings against them. The certified record of the District Court shows that the respondents were personally served with process on April 28, 1967. Indeed, in their answers to Petitioners' Requests for Admissions filed in the Superior Court of Delaware, the respondents freely admitted that they received copies of petitioners' complaint, "which copy had been hand-delivered to you by the United States Marshall at Philadelphia." Notwithstanding this personal receipt

of the complaint and full notice of the proceedings, respondents made no appearance whatsoever in the District Court for the Eastern District of Pennsylvania. Instead, they chose to sit by and do nothing, even after receiving registered letters from Federal District Judge Troutman. It was not until more than four years after the filing of the original complaint, when petitioners filed an action in Delaware on the foreign judgment, that respondents finally chose to assert their claims that service in the original action had been defective.

This inexcusable delay not only constituted laches which should estop the respondents from asserting that defense; it also evidences a blatant disregard for the judicial mechanisms which have been painstakingly constructed to facilitate the peaceful resolution of disputes. To deprive the petitioners at this late date of their day in court would work a manifest and gross injustice upon them and would amount to a judicial sanctioning of respondents' flouting of the judicial process. Fundamental fairness requires that this Court grant certiorari to consider this important question.

CONCLUSION

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

G. Clinton Fogwell, Jr.

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Attorneys for Petitioners

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DONALD A. ROBERTS and
KATHRYN T. ROBERTS, now
known as KATHRYN T.
BRENGLE,

Defendants Below,
Appellants,

v.

No. 277, 1974

J. MILTON PEVAR, a minor by
and through his father and
natural guardian, MATTHEW
PEVAR, and MATTHEW PEVAR
in his own right,

Plaintiffs Below,
Appellees.

Submitted: October 20, 1975

Decided: December 18, 1975

Before HERRMANN, Chief Justice, DUFFY and MCNEILLY, Justices.

Upon appeal from Superior Court. Reversed.

Stanley C. Lowicki, Wilmington, for defendants below, appellants.

Everett P. Priestley, of Cooch and Taylor, Wilmington, for plaintiffs below, appellees.

PER CURIAM:

In this action on a judgment entered in the United States District Court for the Eastern District of Pennsylvania, the Superior Court granted summary judgment to plaintiffs. While several issues have been argued in the appeal, the critical question, as we see it, is whether the

Federal Court obtained jurisdiction over defendants who were non-residents of Pennsylvania. Cf. *Restatement Conflict of Laws* 2d §104. They had been served personally in the State of Delaware by a United States Marshal and the Superior Court concluded that such service was sufficient as a matter of law.

Personal service of process upon a party made within the territorial limits of a Court's jurisdiction is a usual and familiar basis for *personam* jurisdiction. Cf. 20 *Am. Jur. 2d Courts* §118; *Restatement* supra §28. These defendants, however, were not served with process within the land limits applicable to the District Court and, therefore, that Court did not acquire jurisdiction over them on the basis of such service.

Jurisdiction thus had to be based on either a Federal or Pennsylvania Statute authorizing service in Delaware.

First, we recognize that under certain Federal Statutes a United States District Court may acquire *personam* jurisdiction by process served personally outside the territorial limits of the State in which it sits. See, for example, the Statutes discussed in 2 *Moore's Federal Practice* §4.33. But no such applicable Statute has been called to our attention in this diversity case. In its opinion, the Superior Court referred to Federal Rules of Civil Procedure 4(d) and (e) but those Rules are not self-supporting, that is, they depend upon a Statute or order for their authority and there is none pertinent to this case.

Second, as to Pennsylvania, the action was based on an automobile accident which occurred in that State and its Non-Resident Motorist (long-arm) Act, 75 *Purdon's Pa. Stat. Ann.* §2001, *et seq.*, was available as a jurisdictional basis, but it is undisputed that plaintiffs did not comply with its terms. Compare *Alopuri v. O'Leary*, E.D. Pa., 154 F.Supp. 78 (1957). Accordingly, unless some other Pennsylvania Statute provides a basis for the *personam* jurisdiction exercised by the District Court, the judgment must be reversed.

The Superior Court relied not upon a Statute but upon Rule 2079 of the Pennsylvania Rules of Civil Procedure, which provides in part:

"(a) If an action of the class specified . . . [i.e., The Non-Resident Motorist Act] is commenced in the county in which the cause of action arose, process may be served upon the defendant personally or by having the sheriff of said county send by registered mail, return receipt requested, a true and attested copy of the process:

(1) to the Secretary of the Commonwealth, accompanied by the fee prescribed by law, and

(2) to the defendant at his last known address with an endorsement thereon showing that service was made upon the Secretary of the Commonwealth."

Assuming its applicability to the Federal Court action, a matter of some doubt, cf. *Burbank v. Grant*, E.D. Pa., 56 F.R.D. 484 (1972), by its terms the Rule applies only when an action is commenced in the county in which the cause arose and that did not occur here. But, of more importance, the Rule must be read in light of its construction by the Pennsylvania Supreme Court. Briefly, that Court has held that under the Rule substituted service is limited to actions instituted in the county in which the cause of action arose. *Nicolosi v. Fittin*, Pa. Supr., 252 A.2d 700 (1969); *McCall v. Gates*, Pa. Supr., 47 A.2d 211 (1946). Under *Nicolosi*, if an action is begun in a county other than the "cause of action" county, personal service must be obtained. In brief, Rule 2079 permits personal or substituted service only when the action is filed in the "cause of action" county. The purpose of the Rule, obviously, is to circumscribe the circumstances under which the long-arm Statute may be used and, in so doing, it is a Pennsylvania Procedure Act, not a basis for extra-State jurisdiction (other than by compliance with the terms of The Non-Resident Motorist Act). * Certainly nothing therein authorizes a Federal (or Pennsylvania) Court to assume *personam* jurisdiction of a party served outside the State. If the service made in Delaware was valid, then, logically, such service would be valid wherever in the world a party is found. We are satisfied that Pennsylvania never intended such a pretentious claim for what appears to be a modestly stated procedural Rule.

* * * * *

Reversed.

*It is equally clear that the Rule is not a venue restriction on the Federal Court. *Burbank v. Grant* supra; Wright, *Law of Federal Courts* (2 ed) §65.

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

ROBERTS vs PEVAR

No. 277, 1974

The following docket entry has been made in the above cause.

1976, January 9. By direction of the Court, appellees' motion for reargument denied. Counsel notified.

Record, mandate and certified copy of Opinion decided December 18, 1975 to clerk of court below.

Date: 1-9-76

APPENDIX B

SUPERIOR COURT OF THE
STATE OF DELAWARE

BERNARD BALICK
ASSOCIATE JUDGE

COURT HOUSE
WILMINGTON, DELAWARE 19801

Argued: October 8, 1974

Decided: November 7, 1974

Stanley C. Lowicki, Esquire
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Wilmington, Delaware 19801
Attorney for plaintiffs

Everett P. Priestley, Esquire
Market Tower
Wilmington, Delaware 19801
Attorney for defendants

Re: J. Milton Pevar, et al. v. Donald A. Roberts, et al.
670 Civil Action 1971

Gentlemen:

This is the opinion and order on plaintiffs' motion for summary judgment in this action on a Pennsylvania judgment. The Pennsylvania judgment was entered on a judgment by default and jury verdict on damages in the United States District Court for the Eastern District of Pennsylvania. Defendants contend that the judgment is invalid because of various jurisdictional defects.

A valid judgment of another state is entitled to full faith and credit. Restatement, *Conflict of Laws* 2d §93. In the language of Restatement, *Conflict of Laws* 2d §92, a judgment is valid if

- (a) the state in which it is rendered has jurisdiction to act judicially in the case; and
- (b) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected; and
- (c) the judgment is rendered by a competent court; and
- (d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.

The certified court records show that a complaint was filed April 17, 1967. It alleges diversity of citizenship and the jurisdictional amount. It also alleges that one defendant operating a motor vehicle as agent of the other in Delaware County, Pennsylvania negligently struck the infant plaintiff. The return of the Deputy United States Marshall, District of Delaware shows that the summons and complaint were personally served on defendants.

There is no question that the federal court had jurisdiction to act judicially in the case under the Pennsylvania non-resident motorist statute, Title 75 *Purdon's Pa. Stat. Ann.* §§2001-2006; that a reasonable method of notification was employed and a reasonable opportunity to be heard afforded; and that the judgment was rendered by a competent court. Moreover, here there was personal service although substitute service is authorized. 75 *Pa. Stat.* §2002. The non-resident motorist statute is intended to extend the right of service on non-residents. 75 *Pa. Stat.* §2005. Personal service in the manner accomplished in this case is clearly sufficient. See Pa. Rules of Civ. Proc., Rules 1009, 1041, 2029, and 2079; Fed. Rules of Civ. Proc., Rule 4(d) and (e). The fact that the federal district court is not in Delaware County, where the accident occurred, is no defense. *Burbank v. Grant*, 56 F.R.D. 484 (E.D. Pa. 1972); Wright, *Handbook of the Law of Federal Courts* (2nd Ed.) §65. All requirements of a valid judgment are therefore met.

Donald A. Roberts raises in defense that he was a minor, having been born May 2, 1948, when the action against him was commenced. The records show that the court did not appoint a guardian ad litem or

make any other order for his protection, as required by Rule 17(c) of the Federal Rules of Civil Procedure. To this plaintiff responds that defendant's mother, who is his natural guardian, was served with the summons and complaint, that after reaching his majority he received notice, although none was required, of the hearing on damages, and that the judgment against him was not entered in federal court until October 13, 1970, when he was 22 years of age. I need not decide whether the federal court would grant relief from this judgment. This ground, which makes the judgment voidable at most, does not subject it to collateral attack. Restatement, *Judgments* §4, comment a, §78; *Hamilton v. Moore*, 6 A. 2d 787 (Pa. Supr. 1939); Pa. Rules of Civ. Proc., Rule 2034(d); 13 *Stand. Pa. Pract.* §14; *King v. Cordrey*, Del. Super., 177 A. 303 (1935); 42 *Am Jur* 2d, Infants, §216; 46 *C.J.S.* §122b.

Plaintiffs' motion for summary judgment is GRANTED.

Very truly yours,

BERNARD BALICK

BB:jlf

cc: Prothonotary

Superior Court Administrator

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

J. MILTON PEVAR, a minor, by
and through his father and
natural guardian, MATTHEW
PEVAR, and MATTHEW PEVAR in
his own right,

Civil Action No. 670, 1971

Plaintiffs,

v.

DONALD A. ROBERTS and
KATHRYN T. ROBERTS,
Defendants.

*REQUESTS FOR ADMISSIONS
DIRECTED TO DEFENDANTS*

You are hereby requested to admit or deny under oath the following facts within thirty days. If a fact is admitted as to one defendant, but denied as to the other, please so indicate, stating which defendant admits the fact. If a fact is admitted in part, but denied in part, please indicate to what extent the fact is admitted.

1. In or about the month of April, 1967, you received a copy of plaintiffs' Complaint in the United States District Court, which copy had been mailed to you by the United States Marshal at Philadelphia.

2. Upon receipt of said copy of Complaint, you consulted C. Richard Morton, Esquire, of West Chester, Pennsylvania, for legal advice relative thereto.

3. On February 14, 1970, or February 16, 1970, you received a letter from E. Mac Troutman, Judge of the United States District Court for the Eastern District of Pennsylvania, informing you that the action of J. Milton Pevar et al. v. Donald A. and Kathryn T. Roberts was listed for trial at 2:00 p.m. on February 16, 1970. A copy of this letter is attached hereto.

4. On or about February 16, 1970, you received a letter from C. Richard Morton, Esquire, informing you that the case about which you had consulted him was scheduled for trial on February 16, 1970.

5. On or about April 8, 1967, you received a letter from G. Clinton Fogwell, Jr., Esquire, requesting you to contact him about the Pevar accident, to which you did not respond.

6. On or about June 30, 1969, you received a memorandum of law relative to this matter from G. Clinton Fogwell, Jr.

7. On or about February 19, 1970, you received a letter from G. Clinton Fogwell, Jr. informing you of verdicts awarded against you in this matter and asking you to contact him.

COOCH AND TAYLOR

By _____

COOCH AND TAYLOR

By

H. Alfred Tarrant, Jr.
Attorney for Plaintiffs
601 Market Tower
Wilmington, Delaware 19801

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

J. MILTON PEVAR, a minor by
and through his father and
natural guardian, MATTHEW
PEVAR, and MATTHEW PEVAR in
his own right,

Plaintiffs,

vs.

DONALD A. ROBERTS and
KATHRYN T. ROBERTS,
Defendants.

Civil Action No. 670,
1971

**ANSWERS TO REQUESTS FOR ADMISSION
DIRECTED TO DEFENDANTS**

1. In or about the month of April, 1967, you received a copy of plaintiffs' complaint in the United States District Court, which copy had been hand delivered to you by the United States Marshal at Philadelphia.

ANSWER:

ADMIT

2. Upon receipt of said copy of Complaint, you consulted C. Richard Morton, Esquire, of West Chester, Pennsylvania, for legal advice relative thereto.

ANSWER:

ADMIT

3. On February 14, 1970, or February 16, 1970 you received a letter from E. Mac Troutman, Judge of the United States District Court for the Eastern District of Pennsylvania, informing you that the action of J. Milton Pevar et al. v. Donald A. and Kathryn T. Roberts was listed for trial at 2:00 p.m. on February 16, 1970. A copy of this letter is attached hereto.

ANSWER:

On February 16, 1970 received letter at 5:00 p.m. by Kathryn T. Roberts. It was sent to wrong address (addressed to myself, Donald A. Roberts). Therefore, I did not know of the trial until Kathryn T. Roberts delivered the letter to me on February 17, 1970.

4. On or about February 16, 1970, you received a letter from C. Richard Morton, Esquire, informing you that the case about which you had consulted him was scheduled for trial on February 16, 1970.

ANSWER:

DENIED. In fact, Mr. Morton *never* sent a letter informing me of any trial.

5. On or about April 8, 1967, you received a letter from G. Clinton Fogwell, Jr., Esquire, requesting you to contact him about the Pevar accident, to which you did not respond.

ANSWER:

ADMIT. I contacted Mr. Morton.

6. On or about June 30, 1969, you received a memorandum of law relative to this matter from G. Clinton Fogwell, Jr., Esquire.

ANSWER:

DENIED. *Never* received.

7. On or about February 19, 1970, you received a letter from G. Clinton Fogwell, Jr. informing you of verdicts awarded against you in this matter and asking you to contact him.

ANSWER:

ADMIT. I contacted Mr. Morton, who told me not to take any action concerning the letter, that he would handle it.

I, DONALD A. ROBERTS, being duly sworn depose and say that all answers aforementioned above are true and correct to the best of my knowledge.

Donald A. Roberts

I, KATHRYN T. BRENGLE being duly sworn depose and say that all answers aforementioned above are true and correct to the best of my knowledge.

Kathryn T. Brengle

O'DONNELL, HUGHES, AND LOWICKI

By

Stanley C. Lowicki, Esq.

DATED: June 9, 1972